

# ARKANSAS SUPREME COURT

No. CR 06-804

NOT DESIGNATED FOR PUBLICATION

HILLIARD NELSON  
Appellant

v.

STATE OF ARKANSAS  
Appellee

Opinion Delivered    October 5, 2006

*PRO SE* PETITION FOR WRIT OF  
*CERTIORARI* [CIRCUIT COURT OF  
DESHA COUNTY, CR 90-6-1 AC,  
HON. DON EDWARD GLOVER,  
JUDGE]

APPEAL DISMISSED; PETITION  
MOOT

## PER CURIAM

In 1990, a jury found appellant Hilliard Nelson guilty of first degree murder and sentenced him to life imprisonment. This court affirmed the judgment. *Nelson v. State*, 306 Ark. 456, 816 S.W.2d 159 (1991). Appellant subsequently sought postconviction relief under Ark. R. Crim. P. 37.1, and this court affirmed the denial of his petition. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (*per curiam*). On March 17, 2006, appellant filed a pleading in the trial court seeking relief pursuant to Act 1780 of the 2001 Acts of Arkansas, codified as Ark. Code Ann. §§ 16-112-201 – 16-112-207 (Repl. 2006). The trial court denied relief, and appellant has lodged an appeal of that order in this court. Now before us is appellant's *pro se* petition for writ of *certiorari* in that appeal.

We need not address the merits of appellant's petition for writ of *certiorari*, as it is clear on the record before us that he cannot prevail on appeal. This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (*per curiam*);

*Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994) (*per curiam*); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994) (*per curiam*).

Act 1780 of the 2001 Acts of Arkansas was amended by Act 2250 of 2005, effective August 12, 2005. As revised, section 16-112-202(10) provides that a motion for relief under the act must be made in a timely fashion. Section 16-112-202(10) further provides for a rebuttable presumption against timeliness for any motion not made within thirty-six months of the date of conviction, and lists five grounds by which the presumption may be rebutted. Appellant filed his motion for relief under the act more than fifteen years after his conviction.

In order to overcome the presumption, a petitioner must establish, in the petition, one of the grounds listed in section 16-112-202(10)(B). *Douthitt v. State*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (June 15, 2006) (*per curiam*). Under the act, a petitioner may establish that his petition is timely through a showing that incompetence substantially contributed to the delay, that the evidence to be tested is newly discovered, or that a new method of technology that is substantially more probative than prior testing is available. A petitioner can rebut the presumption through other good cause, but may not do so solely through an assertion of his innocence and that denial would result in manifest injustice. *See id.*

While the petition states that the evidence to be tested was not available at trial, the evidence appellant listed to be tested consisted of items of the victim's clothing, including her shoes, semen swabs taken of the victim's body, the victim's voice box, and the rock or concrete block that was the murder weapon. Appellant did not make any assertion that any of this evidence was somehow later discovered. All of the listed evidence was available at trial, and, in fact, appellant referenced

testimony from the trial concerning some of the items later in the pleading.

Appellant failed to rebut the presumption that the motion was untimely, and the trial court did not have jurisdiction to consider the pleading for relief under Act 1780. Because it is clear from appellant's claims that he could not prevail, we must dismiss the appeal, and the petition is therefore moot.

Appeal dismissed; petition moot.